IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,

Plaintiff,

No. 2:00-CV-2041-AJS

vs.

PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual, AND JOHN HERKLOTZ, an individual,

Defendants,

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION FOR RECONSIDERATION OR FOR RELIEF FROM JUDGMENT FILED BY DEFENDANTS, ERIC PARKINSON AND PLAZA ENTERTAINMENT, INC., PURSUANT TO FED.R.CIV.P. 60(b)(6)

AND NOW, comes WRS, Inc., d/b/a WRS Motion Picture Laboratories, a corporation, by its counsel, Thomas E. Reilly, Esquire, with the following Brief in Opposition to Motion of Defendant, Eric Parkinson and Plaza Entertainment, Inc., for Reconsideration or for Relief from Judgment Pursuant to Fed.R.Civ.P. 60(b)(6), as follows:

I. INTRODUCTION

WRS commenced this action seeking to recover from Plaza Entertainment, Inc. (hereinafter referred to as "Plaza") and its guarantors, Charles von Bernuth, (hereinafter referred to as "von Bernuth") Eric Parkinson (hereinafter referred to as "Parkinson" and John C. Herklotz (hereinafter referred to as "Herklotz") of money owed for services rendered and goods supplied on behalf of Plaza Entertainment, Inc. In addition to requesting money judgments, WRS sought a declaration that it could enforce a security interest against Plaza's inventory of copies of films, without infringing on the copyrights of the "rights holders" who had enlisted Plaza to distribute the films, an order foreclosing the security interest to allow Plaza to exploit those rights, an injunction against Plaza transferring those assets, and an accounting of the sales made by Plaza. Following the commencement of the case, WRS, filed bankruptcy. During the Bankruptcy, this case was dismissed without prejudice and closed, a Motion to Reopen was denied and reopened following an appeal. When the Court denied WRS' Motion to Reopen, WRS filed its Complaint again at Case No. 03-1398. When this case at Case No. 00-2041 was reopened, the Court closed Case No. 03-1398 and consolidated Case No. 03-1398 with Case No. 00-2041. (03-1398 Doc. 38; 00-2041 Doc. 70).

The Pleadings

At Case No. 03-1398 Herklotz' pleadings were essentially the same as those filed at Case No. 00-2041. At Case No. 00-2041, Parkinson filed an Answer. (Doc. 12). At Case No. 00-2041 von Bernuth filed an Answer and Affirmative defenses. (Doc. 11). At Case No. 03-1398, on October 29, 2003, von Bernuth filed an Answer, Affirmative Defenses, and Counterclaim. (Doc. 6). Following a denial of their Motion to dismiss, Gibson failed to answer and a default was entered against Plaza and Parkinson.

On February 18, 2005, in conjunction with a Motion to Strike a Default, which was granted, Gibson for Parkinson and Plaza filed an Answer, Affirmative Defenses, and Counterclaim, filed at Case No. 03-1398 in the same form as that filed by von Bernuth in 2003. (Doc. 30). WRS filed Reply to the Counterclaim on March 25, 2005 addressing the averments in von Bernuth's, Parkinson's, and Plaza's, Counterclaims filed by Gibson.

(03-1398 Doc. 36). On May 25, 2001, Plaza filed an Answer and Counterclaim at Case No. 00-2041. (Doc. 23). On August 17, 2001, pursuant to an Order of July 31, 2001, WRS responded with an Answer to the Plaza Counterclaim. (Doc. 37).

Proceedings

Following the reopening of Case No. 00-2041, The Honorable William Standish presided over several status conferences and entered several Case Management Orders. However, in February 2006, the case was reassigned to Judge Arthur Schwab. On February 15, 2006, Judge Schwab scheduled a status conference for March 9, 2006. Following the entry of the scheduling Order, Herklotz filed a Motion for Summary Judgment or Partial Summary Judgment on the WRS claim premised on his claim that his liability had been discharged by events that took place after he gave his guaranty and on the assertion that WRS' records were not sufficiently reliable to establish damages. (Doc.81).

On March 9, 2006, it is WRS' counsel's recollection that he apprised the Court that WRS did not intend to further pursue the claims that pertained to its security interests, including the declaration of its right to sell the videos and the request to foreclose its security interest, but intended only to pursue the claims seeking money judgments against Plaza and the guarantors. WRS recognizes that no entry appears in the docket concerning this statement. However, following the conference, the Court set times for each party to file Motions for Summary Judgment with respect to liability and suggested that the parties retain an accountant to address the reliability of the WRS records. Although John Gibson was present at the conference for Plaza, Parkinson, and von Bernuth, he stated that only von Bernuth was intending to defend. Accordingly, the

Court set a time for WRS and von Bernuth to file their respective Motions for Summary Judgment. (Case Management Order of March 10, 2006) WRS moved for Summary Judgment as to von Bernuth and Herklotz (Doc. 88 and 91, respectively). WRS also moved for a default as to Plaza and Parkinson. (Doc. 85). WRS, Herklotz, and von Bernuth, by Gibson, stipulated to retain Schneider Downs to review the WRS records. (Doc. 86 and 87). When von Bernuth failed to file a Motion for Summary Judgment or pay for the accountant, WRS also moved for default as to von Bernuth. (Doc. 98).

Ultimately, WRS was granted Summary Judgment as to the Herklotz liability. (Doc. 104). Defaults were entered against Plaza, Parkinson, and von Bernuth, (Doc. 97 and 101, respectively). WRS and Herklotz then proceeded to have the accountants examine WRS' records. Following receipt of the report, Herklotz moved to transfer the case to California and WRS filed a Motion for Summary Judgment against Herklotz as to damages and for entry of Default Judgment as to Plaza, Parkinson, and von Bernuth. (Doc. 108, 113 and 118, respectively).

The Court granted WRS' Motion and entered Judgment in favor of WRS and against Herklotz in the sum of $2,584,749.03. (Doc.139). In a separate Order, the Court granted WRS' Motions for Entry of Default Judgments for WRS and against Plaza, von Bernuth, and Parkinson in the sum of $2,584,749.03.(Doc. 140). With regard to Herklotz' Motion to Transfer the case to California, the Court severed Herklotz' cross-claims against Plaza, von Bernuth, and Parkinson, and transferred those severed claims to California. (Order of February 27, 2007). At that point, the Court administratively closed the case on the premise that WRS' essential abandonment of all claims but those seeking money judgment, the Herklotz Judgment, the Default Judgments against Plaza, von Bernuth, and Parkinson, and the severance of the Herklotz' cross-claims concluded all matters as to all parties.

The District Court's Jurisdiction to Entertain and Decide Parkinson and Plaza's Rule 60(b) (6) Motion.

The traditional rule is that upon the filing of a Notice of Appeal the District Court loses jurisdiction over those aspects of the case that are involved in the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 103 S. Ct. 400, 74 L. Ed. 2d 225, 1982 U.S. LEXIS 166, 51 U.S.L.W. 3413, 35 Fed. R. Serv. 2d (Callaghan) 365 (1982). This is a judge made rule based upon prudential rather than statutory considerations. Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90(3d Cir. Pa. 1988). Thus, notwithstanding the appeal, the district court retains jurisdiction to issue Orders affecting the record on appeal. Bensalem Township v. International Surplus Lines Ins. Co., 38 F.3d 1303 (3d Cir. Pa. 1994).

The jurisdiction retained, however, does not appear to extend to the ability to rule on a Motion filed under Rule 60(b). Rather, as the Tenth Circuit stated:

> The modern view is that a pending appeal does not preclude a district court from entertaining a Rule 60(B)(2) motion." 12 Moore's Federal Practice 3d, § 60.67[2][b], at 60-207. We have stated that although a district court may lack "jurisdiction to *grant* the Rule 60(b)(2) motion due to the appeal . . . the court was free to consider the motion." Aldrich Enter., Inc. v. United States, 938 F.2d 1134, 1143 (10th Cir. 1991).

This is consistent with the premise that filing the Rule 60(b) Motion does not destroy appellate jurisdiction that vests when the Notice of Appeal is filed. Stone v. INS, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995). The proper procedure was described in Venen v. Sweet, 758 F.2d 117, 120 n.2 (3d Cir. 1985.),

> Most Courts of Appeals hold that while an appeal is pending, a district court, without permission of the appellate court, has the power both to entertain and to deny a Rule 60(b) Motion. If a district court is inclined to grant the motion or intends to grant the motion, those courts also hold, it should certify its inclination or its intention to the appellate court which can then entertain a motion to remand the case. Once remanded, the district court will have power to grant the motion, but not before.

See also: Dean v. Brandywine Studios, Inc., 2003 U.S. Dist. LEXIS 19873 (D. Del. Nov. 5, 2003).

In addition to certifying the intent to rule on the Rule 60(b) Motion, the District Court retains jurisdiction to enter Orders that aid in the appeal. This jurisdiction includes the ability to enter finality certification under F.R.C.P. 54(b) SafeT Care Mfg. v. Tele-Made, Inc., 497 F.3d 1262 (Fed. Cir. 2007). Where separate judgments have been entered against different defendants some of whom have appealed, the court may enter a certification of finality as to the appealing defendants, preserving or establishing appellate jurisdiction while proceeding on the claims of the non- appealing defendants. Hartwell v. Allied Chemical Corp., 457 F.2d 1335 (3d Cir. Pa.) see also Bendix Aviation Corp. v. Glass, 195 F.2d 267(3d Cir. Pa. 1952).

Finally, although the Default Judgment entered against Parkinson and Plaza did not expressly deal with the Counterclaims, those claims were concluded by the confirmation of the WRS Chapter 11 Plan on June 23, 2005. In re Ben Franklin Hotel Assocs., 186 F.3d 301, 1999 (3rd Cir. 1999).

In light of the above, WRS submits that the District Court may consider, but not decide, the Rule 60(b)(6) Motion of Parkinson and Plaza. If the Court believes it should be granted, the Court should certify to the Circuit Court its intention. However, because the granting of the Motion may destroy the appellate jurisdiction and because the Judgment entered against Herklotz is based upon a separate guaranty document than that questioned by Parkinson, the Court should likewise enter an order, *nunc pro tunc*, certifying the Judgment against Herklotz as final and that there is no reason to delay its finality so that it will be treated as final pursuant to F.R.C.P. 54(b)

Furthermore, WRS submits that the Default Judgments entered against Plaza, Parkinson, and von Bernuth, were entered because of their failure to prosecute their cases. This included their failure to prosecute their respective Counterclaims. The Court understood that the entry of the Default Judgments would conclude the respective Defendant's cases and would result in the finality. WRS has moved for the Court to amend the Judgments entered against Parkinson and Plaza and, following consideration for his Rule 60(b) Motion, to amend the Orders entering Default Judgments to express that the Counterclaims were terminated by the entry of the discharge injunction arising from confirmation of the WRS Chapter 11 Plan so the Default Judgments not only concluded WRS' claim against the respective Defendants, but also to enter judgment for WRS on the respective Counterclaims since any liability thereon was discharged.

The Motions of Parkinson and Plaza Should be Denied

Defendants, Parkinson and Plaza have moved the Court to vacate the Default Judgment against him with a Motion for Reconsideration and for relief under F.R.C.P. 60(b)(6). Rule 60(b) provides the District Court with the power to "relieve a party of a final judgment on such terms as are just." Rule 60(b)(6),

> [G]rants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just," provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5). The Rule does not particularize

> the factors that justify relief, but we have previously noted that it provides courts with authority "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855, 1988 U.S. LEXIS 2737, 56 U.S.L.W. 4637, 11 Fed. R. Serv. 3d (Callaghan) 433 (1988).

Timeliness

The party must make the Motions seeking the relief within a reasonable time, which for matters described in Rule 60(b)(1)(2) and (3) cannot exceed one year. For Motions made under Rule 60(b)(6) to determine what constitutes a reasonable time requires the Court to "scrutinize the particular circumstances of the case and balance the interest in finality with the reasons for delay". PRC Harris, Inc. v. Boeing Co., 700 F.2d 894 (2d Cir. N.Y. 1983); Greenblatt v. Orenberg, 2007 U.S. Dist. LEXIS 21645 (D.N.J. Mar. 27, 2007); aff'd 102 Fed. Appx. 768, 2004 U.S. App. LEXIS 14804 (3d Cir. N.J. 2004); cert. denied, 543 U.S. 943, 125 S. Ct. 368, 160 L. Ed. 2d 255, 2004 U.S. LEXIS 6970, 73 U.S.L.W. 3246 (2004). "[R}easonableness is a mutable cloud, which is always and never the same") (paraphrasing Emerson). Sierra Club v. Secretary of the Army, 820 F.2d 513, 517 (1st Cir. 1987). Under Rule 60(b)(6) it may be more or less than one year. Cotto v. United States, 993 F.2d 274 (1st Cir. P.R. 1993). Reasonableness depends not only on the lapse of time, but also the explanation justifying the delay. Harris v. Union Elec. Co., 846 F.2d 482 (8th Cir. Mo. 1988); Carmona v. United States, 2005 U.S. Dist. LEXIS 8625 (E.D. Pa. Apr. 7, 2005). If the moving party fails to offer an explanation for the lapse of time in moving for the Rule 60(b)(6) relief, the moving party cannot establish the crucial elements necessary to permit the Court to grant the relief. Federal Land Bank v. Cupples Bros., 889 F.2d 764, (8th Cir. Ark. 1989).

In the within case, the Affidavits submitted by Parkinson and Gibson offer explanations for the failure of Parkinson and Plaza to prosecute their defense and counterclaims prior to the entry of the default and Default Judgment. Neither Affidavit, nor the Motions of Parkinson or Plaza, offer any explanation for the lapse of time from May 21, 2007, the date that Parkinson individually and as Plaza's president and principal claimed to have first learned of the Default Judgment, and January 25, 2008, the date that Parkinson and Plaza filed their Motions. Having alleged that Parkinson learned no later than May 21, 2007, that judgments in excess for $2.5 million were entered against him and Plaza, Parkinson waited over eight months to properly move for relief Because of this unexplained lapse of time, neither Parkinson nor Plaza can be considered to have moved "within a reasonable time" as required as a prerequisite to the Court considering his Motion, especially in light of the amount of the judgment and the alleged "exceptional circumstances" that led to the default. For this reason alone, the Motions of Parkinson and Plaza should be denied.

Lack of a Meritorious Defense

The Third Circuit requires that the District Court weigh three factors when considering whether to vacate a default judgment:

> (1) whether the defendant has demonstrated that vacating the default judgment will not visit prejudice on the plaintiff;
>
> (2) whether the defendant has established a meritorious defense; and
>
> (3) whether the defendant has demonstrated that the default was not the result of his culpable conduct.

Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club, Inc., 175 Fed. Appx. 519, 522 (3d Cir. 2006); See also Harad v. Aetna Cas. & Sur. Co., 839 F.2d 979, 982 (3d Cir. 1988). To establish a meritorious defense, Parkinson and Plaza must do more than merely facially assert a defense. Harad v. Aetna Cas. & Sur. Co, supra. "The threshold question is whether Parkinson or Plaza has established a meritorious defense. This is the critical issue because without a meritorious defense neither Plaza nor Parkinson could win at trial", paraphrasing, United States v. $55,518.05 in U.S. Currency, 728 F.2d 192 (3d Cir. Pa. 1984). A meritorious defense is shown when "allegations of defendant's answer, if established on trial, would constitute a complete defense to the action." Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 244 (3d Cir. 1951).

Here, Parkinson claims that he has a meritorious defense, but has not alleged in his motion the nature of those defenses. Rather, Parkinson and Plaza refer to von Bernuth's Motion and to Parkinson Affidavit to set forth facts that support a meritorious defense, WRS submits that Parkinson's statements are inaccurate and not of sufficient probative value to establish that a defense exists to the WRS claim against Plaza and Parkinson.

WRS has filed a Response to the Affidavit, with documentary evidence consisting mostly of Parkinson's own Memoranda the contents of which contradicts much of what Parkinson asserts in his Affidavit. Parkinson in his affidavit essentially asserts that the WRS records do not accurately reflect the amount owed by Plaza and, consequently, Parkinson. As evidence of this, he asserts that WRS maintained two lock box accounts under the services agreement. The first at National Bank of Canada and the second or "new " account at Mellon Financial Services in Los Angeles. As shown in WRS' Response to Parkinson's Affidavit, there was only one lock box account opened under the Services Agreement. WRS initiated the process with the National Bank of Canada in November 1998 shortly after the execution of the Services Agreement. Plaza by Parkinson did authorize the delivery of the document to National Bank of Canada until March of 1999. The lock box was assigned and was maintained by NBOC at Mellon Financial in Los Angeles. The lock box records attached to WRS' Response to the Parkinson Affidavit identify the lock box by number 22011 and show both the NBOC and Mellon Financial name. WRS obtained and delivered to Schneider Downs NBOC's records of this lock box, which were reviewed and correlated to the WRS records by Schneider Downs when establishing the amount of the debt as of December 31, 2000. (Doc. 116 Attachment #1)

After the lock box was opened, Parkinson did not notify his customers to direct payments to the lock box until June 24, 1999. The boldfaced print on the bottom of Parkinson's Exhibit "E" states,

A MAILING TO THE CHIEF FINANCIAL OFFICERS OF ALL PLAZA'SCURRENT CUSTOMERS DETAILING THIS INFORMATION AND AN OVERALL UPDATE ON PLAZA'S NEW FINANCING WILLGO OUT SPEPARATELY ON JUNE 24, 1999 FROM ERIC PARKINSON.

The email that suggests that payments were made to Plaza for which Plaza did not receive credit does not suggest that payments were sent to WRS or the lock box only that payment was made on a Plaza invoice. As shown in WRS' Response to the Parkinson Affidavit, Plaza received, endorsed, and deposited accounts receivable checks into its own account as late as October 1999. Thus, the fact that a creditor paid a Plaza receivable does not establish a defense to Plaza's or Parkinson's liability.

Parkinson also claims that WRS' debt should not have increased, except by interest following the execution of the Services Agreement and that WRS breached by failing to collect the receivables. In fact, WRS records demonstrated that some receivables were collected and funds distributed to Plaza under the Services Agreement. The problem encountered by WRS in collecting the receivables and described by Jack Napor was also experienced by Plaza. Plaza invoiced its customers for the gross sales price of the cassettes ordered. However, Plaza sold these cassettes subject to a right to return for credit against those gross invoices. The returns were sent by Plaza customers to Plaza in Arkansas not to WRS. Plaza could not accurately track the credits to which their customers were entitled. As a result, what appeared as valid accounts receivables were gross amounts subject to credits.

Furthermore, Plaza continued to order new product from WRS throughout 1999 as evidenced by the documents attached to WRS' Response to the Parkinson Affidavit. Contrary to his assertions about lockbox collections, Parkinson was aware of the collections and directed WRS to retain Plaza's share of certain collection in early 2000. See documents attached to WRS' Response to Parkinson's Affidavit). Although Parkinson's Affidavit suggests that two employees "took over" Plaza, in fact, the two employees were attempting to reconcile the Plaza records as contemplated in the Services Agreement and as stated by Parkinson's own words. Furthermore, there was never a foreclosure of the WRS interests in Plaza as Parkinson's Affidavit suggests. In fact, Parkinson was discussing the possibility of such an action in his "workout plan dated April 20, 2000" attached to the WRS Response to the Parkinson Affidavit.

Furthermore, Parkinson claims WRS failed to enforce its security interest in the Plaza inventory of videocassettes. First, Parkinson in his April 20, 2000 work out plan clearly acknowledges that WRS cannot exploit the inventory without infringing on the copyrights of the rights holders. WRS' Complaint in the within action sought a judicial foreclosure of that interest, but abandoned it following the reopening of the case. Enforcement of the WRS security interests in inventory of videocassettes without infringing the rights holders copyrights was acknowledged by Parkinson as an impediment to liquidating the inventory. Furthermore counsel for Herklotz as "rights holder" of Giant of Thunder Mountain" notified WRS to refrain for selling inventory of those videocassettes. (WRS' Response to Parkinson Affidavit.) Thus, exploitation of the inventory was not a means by which the Plaza debt could be reduced.

Contrary to his current assertion, Parkinson throughout his correspondence with WRS acknowledged that Plaza owed a significant amount of money to WRS and engaged in efforts to pay that debt. On behalf of Plaza, he continued to order product from WRS. His contradictory statements in his Affidavit are insufficient to show that Plaza or Parkinson have a meritorious defense to WRS claim and WRS' Motion for Summary Judgment likewise demonstrates that von Bernuth's alleged defenses were not meritorious. Therefore, neither Parkinson nor Plaza can by their own Affidavit or by reference to von Bernuth's pleadings establish the existence of a meritorious defense to the WRS claim, Absent this prerequisite, the requested relief must be denied.

Finally, von Bernuth has claimed that in order for WRS to hold him liable on his guaranty contained in the services agreement, WRS was required to notify him that his guaranty had been accepted. While WRS believes that notice of acceptance of the guaranty was not required under the circumstances, Parkinson has not raised the issue of notice of acceptance as a defense to his personal liability and accordingly has waived notice of acceptance, to the extent that it could have been a defense.

The Counterclaims

As pointed out in the discussion of the process of this case, Plaza, Parkinson, and von Bernuth, filed Counterclaims against WRS during this proceeding. However, once WRS commenced its Chapter 11 bankruptcy proceeding, neither Plaza, Parkinson, nor von Bernuth, moved the Bankruptcy Court for relief from the automatic stay to permit them to pursue those claims in the District Court. Furthermore, WRS confirmed a reorganization plan on June 23, 2005.

Section 1141(d)(1)(A) of the Bankruptcy Code states: "Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation . . . ." 11 U.S.C. § 1141(d)(1)(A). Section 524(a)(2) of the Bankruptcy Code further implements the statutory discharge and finality provided by § 1141. It provides that the discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). In re Ben Franklin Hotel Assocs., supra. Accordingly, although the District Court did not expressly dismiss the counterclaims, WRS has no liability to any of the Defendants on the Counterclaims and Defendants can no longer prosecute those Counterclaims against WRS even as a set off. Thus, those claims cannot be a meritorious defense to WRS' claims on which the Judgment is based.

Recoupment

Plaza's Brief suggests that it is adopting the arguments made by von Bernuth. In an effort to avoid the preclusive impact of the WRS confirmation order, von Bernuth suggested that the confirmation Order did not preclude claims of "recoupment" as distinguished from set offs and claims for affirmative relief.

"A recoupment is the setting up of a demand arising from the same transaction as the Plaintiff's claim or cause of action strictly for the purposes of abatement or reduction of the claim… This doctrine in justified on the grounds that where the creditor's claim against the debtor arises from the same transaction as the debtor's claim, it is essentially a defense to the debtor's claim against the credit rather than mutual obligation and application of limitations set up in bankruptcy would inequitable." Cohen v. Goldberg, 542 Pa. 201, 720 A.2d 1028 (1998). Federal Courts have consistently held that the same transaction requirement must be narrowly interpreted. In re: B&L Oil Co., 782 F.2d 155 (10^{th} Cir. 1986).

In Pennsylvania, recoupment must grow out of the "identical transaction" that furnishes the Plaintiff's cause of action. Household Consumer Discount Co. v. Vespaziani, 490 Pa. 209, 415 A.2d 689 1980). For example, securities laws violation and solicitation that induced the purchase of a condominium could not be asserted as a recoupment in an action to foreclose a mortgage that financed the purchase because the claims did not rise from the mortgage creation itself. Mellon Bank, N.A. v. Pasqualis-Politi, 800 F.Supp 1297 (W.D. Pa. 1992).

Von Bernuth alleges a right to payment, based upon WRS' alleged infringement of copyrights of Plaza and Faber, not from a violation of the Services Agreement. WRS claims arise from Plaza's failure to pay for services rendered by WRS. Accordingly, von Bernuth's claims do not arise from the same transaction or occurrence as gave rise to the WRS claim.

More importantly, in order to assert a "recoupment" von Bernuth would have to be the party entitled to the relief requested. Here, von Bernuth merely asks for an accounting and payment to Plaza and Faber of funds allegedly owed as the result of "copyright infringement" as distinguished from funds collected in the course of business between WRS and Plaza. The rights von Bernuth sought to assert against WRS in the "Counterclaim" were not his own but those of Plaza and Faber. Accordingly, von Bernuth's pleading fails to allege a basis for "recoupment."

In this answer in 00-2041 Parkinson did not assert a Counterclaim. The Pleading Gibson filed for Plaza and Parkinson at 03-01398, contained a Counterclaim that sought an accounting for the payments received by WRS and asserted the same copyright infringement claim as von Bernuth. The accounting has been accomplished by the Schneider Downs report in arriving at the amount owed by Plaza. (Docket no.116) which gave credit to Plaza for all payments shown in the lock box records.. As shown above the copyright infringement claim does not arise from the same transaction or occurrence and is therefore not a "recoupment" claim and is barred by the preclusive effect of the confirmed Plan of Reorganization. Finally, Parkinson and Plaza by Parkinson now assert that WRS should have sold the inventory of tapes which sale their Counterclaims assert would violate their copyrights. That confusion formed the basis for WRS' now abandoned request for declaratory relief and foreclosure. It however, does not support "recoupment." Therefore, the counterclaims have been adjudicated and do not provide Parkinson or Plaza a "meritorious defense."

Exceptional Circumstances

WRS recognizes that Rule 60(b)(6) enables a Court to relieve a party of a judgment upon the showing of exceptional circumstances, which in the context of counsel's inaction requires the exercise of diligence by the client. Boughner v. Secretary of Health, Education & Welfare, 572 F.2d 976, 1978 U.S. App. LEXIS 12257, 25 Fed. R. Serv. 2d (Callaghan) 249 (3d Cir. Pa. 1978). A review of the docket at 03-013908 shows that defaults were previously entered against Parkinson, Plaza and for that matter von Bernuth when they were represented by Gibson. A default was entered at this docket against Plaza. Although these defaults were opened or stricken, it is important to note that Parkinson individually and as president of Plaza had prior experience with Gibson's and his own inattention. WRS submits that in this light, the lax and blasé attitude taken by Parkinson, both individually and as president of Plaza, with respect to this litigation, including his failure to timely compensate his attorney does not constitute the diligence required in order to successfully complain about his chosen counsel's inattention at this late date.

Furthermore, notwithstanding the exceptional circumstances that explain why a default was entered, as shown above, neither Parkinson nor Plaza made an proper effort to explain the delay in moving for the requested relief and failed, as set forth above, to establish a meritorious defense. In addition, neither Parkinson nor Plaza made an effort to show why WRS would not be prejudiced by the vacating of the

Default Judgment. Accordingly, WRS submits that both Parkinson and Plaza have failed to demonstrate the prerequisites to invoking the Court's discretion to vacate the default judgment, not withstanding the conduct of their counsel John Gibson.

Conclusion

For the reasons set forth herein, WRS respectfully submits that the Court should not grant the Motions of Eric Parkinson and Plaza Entertainment, Inc. to reconsider the entry of the Default Judgments or for Relief from the Default Judgments and that this honorable Court deny the Motions.

Respectfully submitted,

THOMAS E. REILLY, P.C.

BY: /s/ Thomas E. Reilly

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CERTIFICATE OF SERVICE

I, Thomas E. Reilly, Esquire, hereby certify that a true and correct copy of Plaintiff's Brief in Opposition to the Motion for Reconsideration or Relief from Judgment filed by Defendants, Eric Parkinson and Plaza Entertainment, Inc., was delivered via first-class mail, postage pre-paid on the 6th day of February, 2008, to the following:

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